Supreme Court, U.S.
FILED

97 683 OCT 16 1997

OFFICE OF THE CLERK

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BRETT L. ARRON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA; DEPARTMENT OF HEALTH AND HUMAN SERVICES; PUBLIC HEALTH SERVICE; INDIAN HEALTH SERVICE; NAVAJO INDIAN HEALTH SERVICE; DONNA E. SHALALA, Secretary of the Department of Health and Human Services; TIMOTHY FLEMING; DOUGLAS PETER; GARY ESCUDERO; JOHN HUBBARD; NATIONAL HEALTH SERVICE CORPS; DONALD L. WEAVER, Director of National Health Service Corps; and MYRIAM CURET,

*Respondents.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

[Counsel listed inside front cover]

Washington, D.C. • THIEL PRESS • (202) 328-3266

Robert W. Ionta
P.O. Box 1059
Gallup, New Mexico 87305
(505) 863-4438
*Counsel for Petitioner.*

70 pp

ROBERT W. IONTA
Post Office Box 1059
Gallup, New Mexico 87305
(505) 863-4438
*– Counsel of Record for Brett L. Arron, Petitioner –*

## QUESTIONS PRESENTED FOR REVIEW

Petitioner, a National Health Service Corps payback physician serving under a special, post judgment, agreement with the United States, was terminated during his probationary period by the Indian Health Service, in retaliation for refusing to provide substandard medical services, for which the Civil Service Reform Act (CSRA) does not provide a remedy. The National Health Service Corps (NHSC herein), refused to place him again for service, for which the CSRA does not provide a remedy, although he is qualified and willing to serve to fulfill his NHSC obligation.

I. Would judicial extension of the CSRA herein to NHSC scholars in the Indian Health Service conflict with the stated policies of Congress to provide quality medical services to and to improve the health care of Native Americans?

II. Does an NHSC pay-back physician who also has an agreement with the U.S. Attorney that he may serve in lieu of payment of a judgment in an Indian Health Service facility, have such an interest by law, contract or Constitution, in his opportunity for service that CSRA limitations on the remedies of mere probationary employees do not apply to him?

III. Have current cases gone too far in applying the CSRA to circumstances which it does not expressly cover and therefore conflict with the purpose of the CSRA itself?

Page

## TABLE OF CONTENTS

Questions Presented For Review . . . . . i

Table of Authorities . . . . . iii

Statement of Jurisdiction . . . . . 1

Statement of The Case . . . . . 1

Argument:

I. The Civil Service Reform Act Was Not Intended To And Should Not Be Applied To The Circumstances Of This Case . . . . . 4

II. The Prevailing Lower Court Case Law Should Be Reexamined . . . . . 11

Conclusion And Relief . . . . . 14

APPENDICES:

Appendix A – Order Denying Petition for Rehearing; July 24, 1997, U.S. Court of Appeals, Tenth Circuit . . . . . 1a

Appendix B – Order and Judgment, May 20, 1997, U.S. Court of Appeals, Tenth Circuit . . . . . 3a

Appendix C – Memorandum Opinion and Final Judgment, Case #96-0052, U.S. District Court for the District of New Mexico . . . . . 18a

Appendix D – Memorandum Opinion and Order, and Final Judgment, Case #96-0885-M, U.S. District Court for the District of New Mexico . . . . . 29a

Appendix E – Constitutional and Statutory Provisions . . . . . 37a

TABLE OF AUTHORITIES

Page

*Cases:*

*Bishop v. Wood,* 426 U.S. 341; 96 S.Ct. 2074; 48 L.Ed.2d 684 (1976) ..... 10

*Bush v. Lucas,* 462 U.S. 367; 103 S.Ct. 2404; 76 L.Ed.2d 648 (1983) ..... 4, 11, 12, 13

*Cleveland Board of Education v. Loudermill,* 470 U.S. 532; 105 S.Ct. 1487; 84 L.Ed.2d 494 (1985) ..... 10

*La Compania Ocho, Inc. v. Forest Service,* (D.C.N.M., 1995) 874 F.Supp. 1242 ..... 13

*Livingood v. Thetford* (D.C.W.D. Okla., 1988) 681 F. Supp. 695 ..... 5

*Mescalero Apache Tribe v. Rhodes* (D.N.M., 1992) 804 F.Supp. 251 ..... 7, 13

*Petrini v. Howard* (10th Cir. 1990) 918 F.2d 1482 ..... 10

*Richardson v. City of Albuquerque* (10th Cir. 1988) 857 F.2d 727 ..... 10

*Saul v. United States* (9th Cir., 1991) 928 F.2d 829 ..... 13, 14

*United States v. Arron* (5th Cir. 1992) 954 F.2d 249 ..... 2, 5, 12

*United States v. Fausto,* 484 U.S. 439; 108 S.Ct. 668; 76 L.Ed.2d 830 (1988) ..... 5, 13, 14

*United States v. Gary* (8th Cir. 1992) 963 F.2d 180 ..... 6

*United States v. St. Thomas* (9th Cir. 1992) 966 F.2d 476 ..... 7

*Cases, continued:* Page

*United States v. Winstar Corporation*, ___ U.S. ___ ; 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).....10

*West v. Bergland* (C.A., Nebr., 1979) 611 F.2d 710; *cert. den* 449 U.S. 821; 101 S.Ct. 79; 66 L.Ed.2d 823.....11

*Statutes:*

5 USC §701 .....1
5 USC §702 .....1, 11
5 USC §704 .....1, 11
5 USC §1214(a)(3).....3, 4
5 USC §1221(a) .....3, 8
5 USC §2105(a).....8
5 USC §2301 .....8
5 USC §2301(b).....4, 8
5 USC §2302(a)(2).....4, 8
5 USC §2302(b).....8
25 USC §1601 (a-g) .....7, 12
25 USC §1602 .....12
28 USC §1254 .....1
28 USC §1346 .....1
28 USC §1361 .....1, 9, 11
28 USC §2201(a).....9
28 USC §2202 .....9
28 USC §2671 *et seq*.....1

*Statutes, continued:* Page

28 USC §2674 ..... 12
28 USC §2680 ..... 12
42 USC §254d(a) ..... 8
42 USC §254(e)(a) ..... 6
42 USC §254 l (a) ..... 6
42 USC §254m(a) ..... 6, 8
42 USC §254m(d) ..... 6
42 USC §254n(a) ..... 6, 8
42 USC §254o(b)(1) ..... 6
42 USC §254o(c)(2) ..... 3, 6

*Regulations:*

5 CFR §315.804(a) ..... 5
5 CFR §315.806 ..... 2, 5
42 CFR §62.1 ..... 6

*Constitutional Provisions:*

U.S. Constitution Article III §2, Clause 1 and Clause 2 ..... 1
U.S. Constitution Amendment I ..... 1, 3
U.S. Constitution Amendment V ..... 1, 3

*Rules:*

Supreme Court Rules, Rule 13 (1) and (3) ..... 1

## CITATIONS TO JUDGMENTS

The cases herein were consolidated for review.

The memorandum opinion of the Tenth Circuit Court of Appeals was published as:

"*Brett L. Arron v. United States of America; Brett L. Arron v. United States of America* [*et al.*], 1997 U.S. App. Lexis 11809. The District Court cases were not published.

## STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was originally entered May 20, 1997. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was filed and an Order denying the same was entered July 24, 1997. This Petition is therefore timely under Rule 13(1) and (3) of the Supreme Court Rules.

Jurisdiction is granted by 28 USC §1254 and Article III §2 of the United States Constitution.

## STATEMENT OF THE CASE

This was a consolidated appeal from two cases filed by Brett L. Arron against the United States, the Department of Health and Human Services, and individuals involved.

The first case, *Arron v. United States,* District Court (New Mexico) case #95-0885, was brought under the Federal Tort Claims Act, 28 USC §1346 and §2671 *et seq.*, and the Administrative Procedures Act, 5 USC §§701, 702, 704, and 28 USC §1361. The second case, *Arron v. United States et al.,* #96-52, was brought under the U.S. Constitution Amendments I and V, the Administrative Procedures Act, the Declaratory Judgments Act and 28 USC §1361. Cases were timely filed in order to comply with their respective limitation periods, which were expiring as the administrative procedure described below was in progress.

Petitioner is a highly qualified anesthesiologist. He received $27,935.00 for his medical education from the National Health Service Corps (NHSC herein) and became a NHSC payback physician. A dispute arose over the location of his service, he was declared in default by the NHSC and ultimately a judgment was entered against him

for $221,131.62 based on three times the original loan and interest (see *United States v. Arron* (5th Cir., 1992) 954 F.2d 249). After the judgment was entered Petitioner and the United States entered into an agreement to permit him to serve his two years required service in the Indian Health Service facility in Gallup, New Mexico. This facility serves Native Americans, mostly a Navajo population and was a "manpower shortage area" approved for service by the NHSC. The agreement was made with the U.S. attorney's office with the approval and consent of the NHSC and was consistent with the Congressional policy of preferring actual service over penalties. Subsequently, while working in Gallup and while he was still within his one year probationary status, Petitioner was fired.

Petitioner in these actions asserts that his firing was accomplished by a number of illegal acts and irregularities outside of those for which relief was provided under CFR §315.806 and occurred because he refused to perform substandard medical care and because he disclosed incidents of the same—the latter arguably being "whistleblowing."

After he was terminated Petitioner requested reassignment to another approved location by the NHSC, but the NHSC failed and refused to place him. Petitioner claims that this arose, at least in part, from certain false information sent out to NHSC by his former superiors.

The United States immediately began efforts to collect the balance of the judgment (which had been partially reduced to around $140,000.00 by Petitioner's service) and continues those efforts. He has not been able to obtain reassignment in the four years since his termination. The United States has executed on his property.

An examination of the regulations of the NHSC does not disclose any rule dealing with the situation in which an NHSC member has been terminated at his service site for reasons which may be wrongful and not his fault, but for which no specific remedy is provided under the CSRA other than a discretionary review for waiver (see 42 USC §254o(c)(2).

In 1993, Petitioner filed a whistleblower complaint under the Whistleblower Protection Act and an individual right of action appeal under 5 USC §1214(a)(3) and 1221(a). This action is still pending before the Merit Systems Protection Board.

The NHSC, a Defendant, is not a party to the MSPB proceedings. Petitioner's claims are not included in those for which the CSRA and Whistleblower Protection Act give relief, particularly the claims that he was terminated in retaliation for refusal to provide substandard and health threatening care to the Native American Patients, contrary to the ethical and legal duties of physicians, the Indian Health Service, and standards of the Joint Commission on Health Care Organizations which oversees these hospitals. Petitioner contends that his actions were both legally and ethically consistent with his duties as a physician and the Congressional policies of protecting and improving health care of Native Americans. He contends that his termination, and more particularly, the subsequent failure of the NHSC to place him conflict with these Congressional purposes and with the policy of the National Health Service Corps to prefer service in health manpower shortage areas.

Petitioner filed these two actions requesting equitable, declaratory, *mandamus*, and other relief on various theories, including tort claims and constitutional claims for violation of the First and Fifth Amendments, free speech,

freedom of association, substantive and procedural due process, liberty and property interests and right of privacy and under the Administrative Procedures Act claiming that the acts were arbitrary and capricious. Petitioner seeks to be restored to his position and employment or placed in another NHSC approved position and that he be given credit on the judgment for his service. Both complaints were dismissed; both cases were appealed, consolidated and upon denial of relief a rehearing was requested. This request for rehearing was denied.

## ARGUMENT

### I.

### THE CIVIL SERVICE REFORM ACT WAS NOT INTENDED TO AND SHOULD NOT BE APPLIED TO THE CIRCUMSTANCES OF THIS CASE.

The issues in this case have not before been presented to this Court. The questions are important as they concern the interplay between the CSPA and other express Congressional policies. They are appropriate for review by this Court because this decision of the Tenth Circuit will apply to every National Health Service Corps payback physician and, in addition, will apply to every probationary Indian Health Service employee. The case sets the employment policies of the CSRA, as interpreted by the lower Courts, against the express Congressional policies described below. This is not a routine employment case.

The essential issue is whether the Civil Service Reform Act (Pub L. No. 95-454, 92 Stat IIII; codified in 5 USC §§1214(a)(3), 2301, 2302 and others) was intended to apply to this case. The Court of Appeals held that under *Bush v. Lucas,* 462 U.S. 367; 103 S.Ct. 2404; 76 L.Ed2d

648 (1983) and *United States v. Fausto*, 484 U.S. 439; 108 S.Ct. 668; 76 L.Ed.2d 830 (1988) and subsequent cases, the CSRA provides exclusive remedies for Petitioner, even if they are incomplete.

Petitioner asserts that this broad statement is wrong.

CSRA grants few rights to a probationary employee for redress from a termination (see 5 CFR §315.804(a) and §315.806 and the lower court opinion in the appendix. A probationary employee does not have a property interest or expectation in his employment status (e.g., *Livengood v. Thetford* (D.C.W.D. Okla., 1988) 681 F.Supp. 695) and has limited statutory remedies.

Congress could not have intended these limitations of the CSRA apply to Petitioner, who, by virtue of his NHSC status and commitment, and because of his agreement with the U.S., has a relationship and expectation beyond and outside of the limited scope of federal employment.

If the CSRA were intended to apply to NHSC payback physicians or those who had special agreements with the U.S., then it would, in Petitioner's case, conflict with express Congressional policies and would have a chilling effect on the NHSC scholarship program, would discourage physicians from refusing to give substandard medical care for Native Americans, and would conflict with the express Congressional purpose of improving health care for Native Americans.

Petitioner's claims ultimately arise out of this NHSC payback status and agreement with the U.S., not the employment relationship, as was held in *United States v. Arron* (5th Cir., 1992) 954 F.2d 249, 251. Petitioner has a property interest in that NHSC relationship, recognized

by the post-judgment agreement with the U.S. Attorney and the NHSC. Thus the CSRA should not apply to Petitioner.

Petitioner's claims for equitable, declaratory and *mandamus* relief against the NHSC are based on the National Health Service Corps Act, and the later agreement that he would be placed for service. Although the termination of his employment was a cause of the failure to reassign him, it is not the only alleged cause.

Congress's purpose for creating the NHSC scholarship program was that quality medical services be provided in areas of the United States where they are not otherwise available, in ("health manpower shortage areas") see 42 USC §254e(a), §254m(d). The NHSC program was enacted "to assure an adequate supply of trained physicians . . ." (42 USC §2541(a) and 42 CFR 62.1). These, in return for receiving financial assistance for their medical education, "shall provide service in the full-time clinical practice. . ." (42 USC §254m(a) or in a full time *private* clinical practice (42 USC §254n(a)). There is a substantial penalty for failure to serve (see 42 USC §254o(b)1). The statute is directed at requiring service. These significant penalties for failure to perform the services agreed to under the NHSC program in Petitioner's case totaled $221,132.63 on a $27,935.00 loan, plus interest.

Once someone has breached the service agreement he or she has no remedy with the NHSC other than discretionary waiver of the penalties by the Secretary (or a separate and subsequent agreement with the NHSC and U.S. Attorney as Petitioner had). (See *United States v. Gary* (8th Cir., 1992) 963 F.2d 180, 183, and 193 note, and see 42 USC §254o(c)(2).

> "The penalty for a physician in breach of the obligated service requirement is a heavy one, far exceeding the actual monetary loss to the United States." (*U.S. v. St. Thomas* (9th Cir., 1992) 966 F.2d 476, 480).

"Health manpower shortage areas" include, but are not limited to, areas populated by Native Americans. Thus the Indian Health Service Hospital such as that one at which Appellant served have become major participants in and recipients of the benefits of this program. This is consistent with Congressional observations and purpose that:

> "(e) All other Federal Service and programs in fulfillment of the Federal Responsibilities to Indians are jeopardized by the low health status of the American Indian People." (25 USC §1601 (a-g));
>
> and
>
> "The Congress hereby declares that it is the policy of this Nation . . . [to provide] the highest possible health status to Indians and to provide existing Indian Health Service with all resources necessary to effect that policy." (25 USC §1602).

Congressional Policy prefers actual service by the NHSC Scholar over repayment of the loan.

The strong Congressional policy to protect Native Americans was recognized in *Mescalero Apache Tribe v. Rhoades* (D.N.M., 1992) 804 F.Supp. 251.

> ". . . I question the capacity of the CSRA appellate process to encompass and confront the instant controversy. This dispute is not a routine employment grievance. This case involves an important question of public policy that may not secure its due attention through the CSRA's rigidly structured remedial scheme. Even were appeal to the MSPB available

with certainty, both the scope and standard of MSPB review appear lacking . . ."

*Ibid.*, 804 F.Supp. 251, 256.

In the case of the Indian Health Service, both policies are relevant. The NHSC directs the Secretary to take positive affirmative steps to provide NHSC members for service. The loan repayment program carries out these purposes by obligating service.

NHSC Scholars do not become such because they are Federal employees. In some cases they may not be Federal employees at all (42 USC §§254d(a) and 254m(a)).

The damages which Petitioner suffers now primarily arose from a failure to complete a "service obligation", not a failure to be a Federal employee. (42 USC §254-o(b)(1).

The CSRA (5 USC §2302(b)11) defines a "prohibited personnel practice". That definition applies to the whistleblower claim, but is irrelevant to failure of the NHSC to place Petitioner. Petitioner need not be a Federal employee to satisfy his service request (42 USC §254-n(a).

The current failure to reassign Petitioner by NHSC is not a personnel practice (5 USC §2302(a)(2)). Thus the CSRA should not extend to the claims against the NHSC. This fact is also an example of how the considerations under the NHSC program and those of federal employment are distinct.

The NHSC is not an officer, employer or supervisor (5 USC §§2301 or 2302). Appellant was not an "employee" of the NHSC (or of any Federal agency at the time request for reassignment was made or the suits were filed) under 5 USC §1221(a) and 5 USC §2105(a).

Thus Petitioner is not precluded by the CSRA from seeking equitable, declaratory, or *mandamus* relief ordering the NHSC to approve a reassignment so that he can complete his service requirement.

There are no elaborate procedural protections afforded Petitioner under the NHSC Act, distinct from the scheme under the CSRA.

Also the subsequent agreement between NHSC and the U.S. attorney and Petitioner that Petitioner could serve in lieu of payment of the judgment merely carried out the intent of the NHSC Act, in which Appellant had an obligation to serve and NHSC had an obligation to approve a placement.

The Federal Courts have general jurisdiction to issue a writ of *mandamus* (or its equivalent) under appropriate circumstances (28 USC §1361) or a declaratory judgment under 28 USC §§2201(a) and 2202.

In this case, Petitioner alleged in his complaints and maintains that there was lack of any effective remedy to compel reappointment under the CSRA. This, because of Petitioner's probationary status, impacts on the overall NHSC and Indian Health Service programs.

There is also a chilling effect on those potential participants in the program as they are being placed in a position of incurring penalties of treble damages even if they are terminated as a probationary employee on a whim, under sham and procedures, as in this case, or for other improper reasons, and are not able to compel re-placement by NHSC, either in federal employment or in other private employment within an area of need. As an NHSC scholar Petitioner is entitled to expect that the NHSC will

carry out its bargain. (cf. *United States v. Winstar Corporation,* ___ U.S. ___ ; 116 S.Ct. 2432; 135 L.Ed2d 964 (1996).

The separate agreement with the NHSC and U.S. Attorney rose to the level of property rights and invokes a liberty interest (see *Bishop v. Wood,* 426 US 341; 96 S.Ct 2074; 48 L.Ed.2d 684 (1976); *Richardson v. City of Albuquerque* (10th Cir., 1988) 857 F.2d 727.

> "To establish a property interest in a particular benefit, one must have a legitimate claim of entitlement" to it . . . [which] need not be grounded on a specific statutory or contractual provision. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support [her] claim of entitlement to the benefit and that [she] may invoke at a hearing." *Richardson v. City of Albuquerque, Ibid.,* p. 731. Also see *Cleveland Board of Education v. Loudermill,* 470 U.S. §532; 105 S.Ct. 1484; 84 L.Ed.2d 494 (1985).

Petitioner had a legitimate expectation of more interest and rights than a typical probationary employee has under the CSRA.

NHSC scholars have too much at stake under the NHSC payback program to be told that, if they become a federal employee to fulfill their service requirements, they can be compelled to incur huge debts and liabilities, or damage to their reputations, and then be told that as "probationary employee" they have no remedy for such misconduct.

The essence of the legal relationship between the United States and Petitioner is that Petitioner must serve, is required to serve and, correspondingly, will be allowed to serve. Otherwise it is an illusory promise (cf. *United States v. Winstar Corporation, supra*).

## II.
## THE PREVAILING LOWER COURT CASE LAW SHOULD BE REEXAMINED.

The Circuits have seized upon language similar to that found in *Bush v. Lucas* (supra) and have grounded their analyses on the phrase: "Federal Civil servants are now protected by an elaborate comprehensive scheme . . . by which improper actions may be addressed . . ." (*Petrini v. Howard* (10th Cir., 1990) 918 F.2d 1482, 1483, citing from *Bush.*

But the Courts have been reluctant to refer to the other statement in the *Bush* case:

> "The federal courts' power to grant relief not expressly authorized by Congress is firmly established." *Bush,* supra 76 L.Ed.2d at 654.

The important policy issue here is that this Court has declared that the CSRA is a remedial statute, creating remedies, but when lower court interpretations in fact reduce or eliminate remedies of those very employees to whom the law is supposed to give remedies, then these interpretations themselves are inconsistent with the purpose of the CSRA and should be critically examined.

For example, *mandamus,* 28 USC §1361 affords a basis for relief. The Administrative Procedures Act (APA herein) 5 USC §702 and 704 *et seq.* if interpreted as written provides another basis for review, particularly when CSRA administrative remedies are futile, such as the case at bar. "Futility" is not an immutable concept but depends upon the facts and whether relief by agency action is highly improbable, *West v. Bergland* (C.A. Nebr., 1787) 611 F.2d 710; *cert. den.* 449 U.S. 821; 101 S.Ct. 79; 66 L.Ed.2d 823, especially in connection with a Constitutional rights. *Bush* itself stressed that there were

*effective* remedies available to the employee in that case, which the majority considered in their holding:

> "The question is not what remedy the Court should provide for a wrong that would otherwise go unredressed . . . *the question is whether an alternative remedy should be provided where the wrong may be redressed* . . ." *Bush* 76 L.Ed.2d at p. 666; (Emphasis supplied).

In this case Petitioner has a remedy for whistleblowing, which he is exercising. This remedy is incomplete and inadequate. There is no remedy against failure of the NHSC to reassign Petitioner or the other claims. There is no remedy for the sham hearings. Merely because Petitioner was a federal employee there is no remedy given to probationary employees under the CSRA for retaliatory discharge because of refusal to perform substandard care - yet the policy expressed in 25 USC §1601(a-g) and §1602 is to improve, not diminish health care. In this case the remedies are inadequate.

The cases foreclosing judicially implied remedies are based on the understanding of the courts that Congress intended the CSRA to be exclusive within its ambit, but *not* upon the specific written expression of Congress itself:

The Federal Tort Claims Act states:

> "The United States shall be liable, respecting the provisions of this title, relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." (28 USC §2674).

The exceptions under 28 USC §2680 for contract claims do not apply because the NHSC scholarship relationship arises from statutory directives (see *United States v. Arron* (5th Cir., 1992) 954 F.2d 249, 251).

Petitioner respectfully suggests that Circuit decisions have treated CSRA coverage too simplistically.

*Bush v. Lucas* and *United States v. Fausto* (supra) are the seminal cases. *Bush* was limited to holding that new *nonstatutory* causes of action for *damage* remedies would not be implied. The decision in *Fausto* was over dissent.

Some have questioned whether the "bright line" interpretation of CSRA applicability is appropriate, correct or wise in all circumstances.

In the *Fausto* dissent:

> "Given the comprehensive nature of the CSRA, it is highly improbable that Congress intended to make any significant changes in the law that are not plainly discernible from the language of the statutes . . ." *United States v. Fausto,* supra, 98 L.Ed.2d at pp. 849-850.

A New Mexico case, *La Compania Ocho, Inc., v. Forest Service* (D.C.N.M., 1995) 874 F.Supp. 1242, suggested a reluctance to allow sweeping elimination of remedies by the CSRA.

> ". . . This Court would then be confronted with the issue of whether Congress could completely eliminate the availability of *Bivens* relief without providing any substitute means of reviewing or redressing unconstitutional conduct of all federal officers. That Congress would have intended such result is difficult to accept." (*Ibid.*, p. 1250).

Also see *Mescalero Apache* (supra).

*Saul v. United States* (9th Cir., 1991) 928 F.2d 829, and the case at bar exemplify how far the Courts have departed from *Bush* and *Fausto,* with holdings that "[the] comprehensiveness of the CSRA's remedies evinced a clear congressional and intent to permit fed-

eral court review *as provided in the CSRA or not at all".* (*Saul,* supra, p. 839; emphasis supplied).

Petitioner further respectfully suggests that the dissent in *Fausto* is a worthy guide in this case and that Petitioner's class of former employees of the U.S., especially those carrying out the express policy of the U.S. toward Native Americans were not intended to be denied effective remedies.

## CONCLUSION AND RELIEF

For the above mentioned reasons Petitioner respectfully prays that the Court may grant a Writ of Certiorari.

Respectfully submitted,

ROBERT W. IONTA
Post Office Box 1059
Gallup, New Mexico 87305
(505) 863-4438
*Attorney for Petitioner.*

October 16, 1997

## APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-2086

BRETT L. ARRON,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

---

No. 96-2288

BRETT L. ARRON,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF HEALTH AND HUMAN SERVICES; PUBLIC HEALTH SERVICE; INDIAN HEALTH SERVICE; NAVAJO INDIAN HEALTH SERVICE; DONNA E. SHALALA, Secretary of the Department of Health and Human Services; TIMOTHY FLEMING; DOUGLAS PETER; GARY ESCUDERO; JOHN HUBBARD; NATIONAL HEALTH

SERVICE CORPS; DONALD L. WEAVER, Director of National Health Service Corps; and MYRIAM CURET,

Defendants - Appellees.

ORDER

Filed July 24, 1997

Before **ANDERSON, TACHA,** and **BALDOCK,** Circuit Judges.

---

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: [Illegible]
Deputy Clerk

## APPENDIX B

[Filed May 20, 1997]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-2086
(D. New Mexico)
(D.C. No. CIV 95-0885-M)

BRETT L. ARRON,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

---

No. 96-2288
(D. New Mexico)
(D.C. No. 96-CV-52-LH)

BRETT L. ARRON,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA;
DEPARTMENT OF HEALTH AND HUMAN
SERVICES; PUBLIC HEALTH SERVICE;
INDIAN HEALTH SERVICES; NAVAJO INDIAN
HEALTH SERVICE; DONNA E. SHALALA, Secretary

of the Department of Health and Human Services; TIMOTHY FLEMING; DOUGLAS PETER; GARY ESCUDERO; JOHN HUBBARD, National Health Service Corps; DONALD L. WEAVER, Director of National Health Service Corps; and MYRIAM CURET,

Defendants - Appellees.

## ORDER AND JUDGMENT*

Before **ANDERSON, TACHA,** and **BALDOCK,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. This cause is therefore ordered submitted without oral argument.

The United States obtained a judgment against Appellant Brett L. Arron after he breached the terms of his National Health Service Corps scholarship agreement. In lieu of paying the judgment, Arron agreed to work for the Indian Health Service for two years. During his first year as a probationary employee, however, the Indian Health Service terminated Arron's employment. After pursuing his remedies for wrongful termination under the Civil Service Reform Act, Arron brought two separate actions in the District Court of New Mexico, seeking redress for his grievances arising from his termination. The district court dismissed the actions, and denied

---

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Arron's motions for leave to amend. We consolidate Arron's appeals from the district court's order in each case; and because we find that the Civil Service Reform Act preempts Arron's claims, we affirm both judgments.

## BACKGROUND

The seeds of this dispute were planted on May 1, 1979, when Arron applied for a National Health Service Corps (NHSC) scholarship in order to finance his medical education at Tulane University. Congress created the NHSC "to provide primary health services in health professional shortage areas." 42 U.S.C. §254d(a)(2). The NHSC provides scholarships to students in certain health care education programs and, in return, the students agree to work for a certain period of time in health professional shortage areas. 42 U.S.C. §§254*l*(b)(4), 254m(a). During the time that a scholarship recipient is performing the service obligation, the recipient becomes either a member of the federal civil service or a commissioned officer of the Public Health Service. 42 U.S.C. §§254d(a)(1), 254m(b)(1)(A)-(B).

Arron received the scholarship and executed a contract in which he agreed to serve one year as a member of the NHSC and to provide clinical services in a designated health professional shortage area for each year of the award. Thereafter, he received $27,835 for two academic years. Following his studies at Tulane, Arron received a deferment from his service obligation in order to complete a three-year residency in internal medicine. *See* U.S.C. §254m(b)(5)(A)(i) (authorizing deferment to allow scholarship recipient to complete a residency). A dispute developed between Arron and the NHSC regarding his deferment for his third year in residency and the location where he would perform his service obligation.

The NHSC eventually notified Arron that he was assigned to a clinic in Texas, but Arron refused to accept this assignment. The United States filed suit against Arron seeking damages for his breach of the scholarship contract. *See* 42 U.S.C. §254*o*(b)(1)(A) (setting forth damages formula in the event a scholarship recipient fails to begin service obligation). The District Court for the Eastern District of Louisiana entered judgment against Arron for $221,131.62, and the Fifth Circuit affirmed, *United States v. Arron*, 954 F.2d 249, 251, 253 (5th Cir. 1992).

In lieu of paying the judgment, Arron agreed to serve two years in a designated health professional shortage area. During the two years of service, the judgment debt would be reduced by approximately $10,000 per month and, at that rate, the entire judgment would be satisfied at the end of the two years of service. Accordingly, on about August 8, 1992, Arron became a member of the federal civil service and began working as an anesthesiologist, in probationary employee status for the first year, at the Gallup Indian Medical Center (the Gallup Center), a medical facility in Gallup, New Mexico. The Gallup Center operates under the purview of the Indian Health Service, which is a component of the Public Health Service and the United States Department of Health and Human Services. Arron alleges that while he was employed at the Gallup Center, the Center was badly mismanaged and provided substandard care to its patients. Arron alleges that he refused to provide substandard care and "[m]ade various reports" about the mismanagement and care problems at the Gallup Center. Appellant's App. in First Action at 13 (Compl.); Appellant's App. in Second Action at 43 (Am. Compl.). He contends that because of his refusal to provide substandard care and because he reported the mismanagement and care problems, he was wrongfully terminated on June 5, 1993.

The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C., primarily §§1214, 2302), provides federal employees procedures for redressing grievances regarding their employment. Because Arron was terminated during his probationary period, he was entitled to minimal procedural protections from the Indian Health Service. The agency was only required to "notify [] him in writing as to why he [was] being separated and the effective date of the action." 5 C.F.R. §315.804(a). The agency was also required to indicate in the notice its "conclusions as to the inadequacies of his performance or conduct." *Id.*

Under the CSRA, all employees, including probationary employees, are entitled to report to the Office of Special Counsel that they have been subjected to a "prohibited personnel practice." 5 U.S.C. §1214(a)(1)(A).[1] Special Counsel is required to "investigate the allegation to the extent necessary to determine whether there are

---

[1] "Prohibited personnel practice[s]" include (1) taking a personnel action with respect to any employee "because of . . . any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . . a violation of any law, rule, or regulation, or [ ] gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" (whistleblowing), (2) taking a personnel action against any employee "for refusing to obey an order that would require the individual to violate a law," (3) discriminating against any employee "on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others." (4) taking a personnel action which "violates any law, rule or regulation implementing, or directly concerning, the merit system principles" set forth at 5 U.S.C. §2301, 5 U.S.C. §2302(b)-(8)(A), (9)(D), (10), (11). On such merit principle provides that "[a]ll employees . . . should receive fair and equitable treatment in all aspects of personnel management . . . with proper regard for their privacy and constitutional rights." 5 U.S.C. §2301(b)(2).

reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." *Id.* If Special Counsel determines that there are reasonable grounds to believe that a personnel action was taken or is to be taken as a result of a prohibited personnel practice, the following relief is available: (1) Special Counsel may request the Merit Systems Protection Board (Board) to order a stay of the personnel action, 5 U.S.C. §1214(b)-(1)(A)(i); (2) if Special Counsel determines that corrective action is required, it must report the determination to the Board, the agency, involved, and the Office of Personnel Management, 5 U.S.C. §1214(b)(2)(B); (3) if the agency does not take corrective action within a reasonable period of time, Special Counsel may petition the Board for corrective action, 5 U.S.C. §1214(b)(2)(C); and (4) if Special Counsel petitions the Board, the Board must receive comments from Special Counsel, the agency, the Office of Personnel Management, and the employee, and then order such corrective action as it considers appropriate, 5 U.S.C. §1214(b)(3)-(4).

If Special Counsel determines that there are not reasonable grounds to believe that a personnel action was taken or is to be taken as a result of a prohibited personnel practice, it may terminate the investigation. If Special Counsel terminates the investigation, it must notify the employee of: (1) the "relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations;" and (2) the reasons for the termination. 5 U.S.C. §1214(a)(2)(A).

If Special Counsel terminates an investigation regarding an allegation that the employee was subjected to a prohibited personnel practice in retaliation for whistleblowing, as defined in 5 U.S.C. §2302(b)(8), the employee is entitled to file an individual right of action in

order to seek corrective action directly from the Board. 5 U.S.C. §§1214(a)(3), 1221(a). The Board must order "such corrective action as the Board considers appropriate if the employee . . . has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action." 5 U.S.C. §1221(e)(1). However, the Board may not order corrective action if the agency demonstrates "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. §1221(e)(2). The employee may appeal the Board's final decision to the United States Court of Appeals for the Federal Circuit. 5 U.S.C. §§1221(h), 7703(b)(1).[2]

On June 14, 1993, Arron filed a complaint with the Office of Special Counsel, alleging that he was subjected to prohibited personnel practices, including retaliation for whistleblowing. Special Counsel declined to seek a stay of Arron's termination or any other corrective action from the Board. Then, on November 18, 1994, Special Counsel issued a letter declining to proceed with the whistleblower complaints. Arron filed an individual right of action appeal, seeking corrective action from the Board regarding his whistleblower complaints. According to the record, that appeal is pending.

Thereafter, in August of 1995, Arron sued the United States in district court. In his complaint, Arron alleged that his supervisors failed to follow personnel policies in managing the Gallup Center, failed to follow personnel

---

[2]These provisions, providing greater protections within the CSRA scheme to whistleblowers, were enacted as part of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, (codified in scattered sections of 5 U.S.C.), an amendment to the CSRA.

policies in terminating Arron, and terminated Arron in retaliation for his refusal to provide substandard care and because he reported problems regarding the Center. Based on these allegations, Arron claimed that the United States was liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b), 2671 *et seq.*,[3] for various state torts, including negligence, retaliatory discharge, prima facie tort, and tortious interference with economic advantage. Aaron claimed that as a result of his termination he suffered "moving costs, loss of income, damage to reputation, emotional distress, loss of ability to repay the NHSC obligations, increased costs, interest and penalties on the judgment, costs of seeking other employment, loss of personal property through execution on the above judgment, attorneys fees and general damages." Appellant's App. in First Action at 16 (Compl.).

The United States moved to dismiss Arron's complaint, arguing that the Civil Service Reform Act provides the exclusive remedy for his grievances regarding his employment. In response, Arron moved for leave to amend his complaint to add a claim under the Administrative Procedures Act (APA). 5 U.S.C. §701 *et seq.*,[4] and to add

---

[3]The Federal Tort Claims Act provides that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. §2674.

[4]The Administrative Procedures Act provides that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or

[footnote continued]

additional defendants. Arron's proposed amended complaint alleged that his supervisors' actions were arbitrary and capricious, violated his constitutional rights, and violated procedures required by law. The district court granted the United States' motion to dismiss with prejudice and denied Arron's motion for leave to amend as futile.

However, in January of 1996, before the district court made these decisions in the first action, Arron brought a second action, naming the United States, the Department of Health and Human Services, the Indian Health Service, the Navajo Area Indian Health Service, the National Health Service Corps, and certain employees of these agencies (in their individual and official capacities) as defendants (the Defendants). His first amended complaint contained substantially the same allegations as the complaint in the first action and claimed (1) that the Defendants violated Arron's First, Fourth, and Fifth Amendment rights to free speech, freedom of association, substantive and procedural due process rights, freedom from deprivation of liberty and property interests, and right of privacy, and (2) that the Defendant's actions were arbitrary and capricious. Appellant's App. in Second Action at 62 (Am. Compl.). As relief, Arron requested that the court declare that the Defendants acts were unlawful and unconstitutional, restore him to his position with back pay, grade, benefits, and full credit toward the judgment, and award him costs and attorney's fees.

---

equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §702.

The Defendants moved to dismiss Arron's amended complaint in the second action, also arguing that the Civil Service Reform Act provides Arron's exclusive remedy for his grievances. In response, Arron moved for leave to amend his complaint to make further allegations regarding his Fifth Amendment claim in the event the court found this claim insufficient. The district court granted the Defendants' motion to dismiss with prejudice and denied Arron's motion for leave to amend as futile.

## DISCUSSION

We review de novo a district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6). *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1496 (10th Cir. 1995); *Steele v. United States*, 19 F.3d 531, 532 (10th Cir. 1994). In doing so, we accept all well-pleaded allegations as true and uphold a dismissal only if it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Maez*, 54 F.3d at 1496.

We review a district court's denial of a motion for leave to amend for abuse of discretion. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1028 (10th Cir. 1992). "Although Fed.R.Civ.P. 15(a) requires leave to amend be given freely, that requirement does not apply where an amendment obviously would be futile." *TV Communications*, 964 F.2d at 1028. A proposed amendment is futile if the complaint, as amended, would be subject to dismissal. *TV Communications*, 964 F.2d at 1028.

In *Bush v. Lucas*, 462 U.S. 367 (1983), the Supreme Court addressed the remedial scheme of the CSRA, stating that "[f]ederal civil servants are now protected by an

elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies." *Id.* at 385. Because of the CSRA's comprehensive remedial scheme, the *Bush* Court refused to recognize a *Bivens* remedy, under the facts of that case, for the alleged violation of First Amendment rights in federal personnel decisions. *Id.* at 390.

Several years later, the Supreme Court in *United States v. Fausto,* 484 U.S. 439 (1988), was presented with the question of whether the CSRA, which provides no review of an agency's decision to suspend a nonpreference eligible excepted service employee without pay, precluded the employee from seeking review in the Court of Federal Claims under the Back Pay Act. *Id.* at 440-41. The Court noted that Congress intentionally excluded nonpreference eligible excepted service and probationary employees from the right to review of certain agency actions afforded other categories of employees and, thus, held that the CSRA's "deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act." *Id.* at 455.

Based on the principles of *Bush* and *Fausto,* we have stated that it is "beyond dispute that the CSRA was intended to provide the exclusive procedure for challenging federal personnel decisions." *Petrini v. Howard,* 918 F.2d 1482, 1485 (10th Cir. 1990). Accordingly, we have held that "Federal and state court actions 'complain[ing] of activities prohibited by the CSRA . . . are preempted

by the CSRA.' " *Steele v. United States*, 19 F.3d 531, 533 (10th Cir. 1994) (quoting *Petrini*, 918 F.2d at 1485). Arron's FTCA claims and proposed APA claim in the first action, as well as his APA claim and constitutional claims[5] in the second action—all of which challenge the conditions of his employment, the procedures or lack of procedurecsleading up to his termination, and the termination of his employment—fall within the scope of, and are, therefore, preempted by, the CSRA. *See* 5 U.S.C. §2302 (broadly defining "prohibited personnel practice"); *supra* n. 1 (listing prohibited personnel practices at issue in this case).[6]

---

[5]There is some dispute about whether Arron's constitutional claims in his second action are *Bivens* claims for damages or claims for equitable relief. In his brief on appeal, Arron contends that he is "seeking declaratory, *Mandamus* and equitable relief in this action, not money. Therefore, none of the cases holding that *Bivens* remedies are barred by the CSRA apply, because this is not a *Bivens* action." Appellant's Br. in Second Action at 11. The Defendants maintain that Arron argued before the district court that he should be able to maintain a *Bivens* action. Thus, they assert that he "should not now be able to refocus his argument on an issue not presented below and ask this Court to allow him to pursue non-*Bivens* constitutional claims." Defendants' Br. at 15. However, whether we construe Arron's constitutional claims as *Bivens* or equitable claims, both are federal actions complaining of activities prohibited by the CSRA and, thus, are preempted under our case law.

[6]Our holding is consistent with numerous cases specifically holding that the CSRA preempts FTCA claims, *see Steele*, 19 F.3d at 533; *Petrini*, 918 F.2d at 1485; *Grisham v. United States*, 103 F.3d 24, 27 (5th Cir. 1997). APA review, *see McAuliffe v. Rice*, 966 F.2d 979, 979 (5th Cir. 1992); *Stephens v. Department of Health & Human Servs.*, 901 F.2d 1571, 1575 (11th Cir. 1990); *Ryon v. O'Neill*, 894 F.2d 199, 200 (6th Cir. 1990), *Bivens* actions, *see Bush*, 462 U.S. at 390; *Brothers v. Custis*, 886 F.2d 1282, 1284-85 (10th Cir. 1989); *Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991), and actions for equitable relief for constitutional violations, *see Lombardi v. Small Bus. Admin.*, 889 F.2d 959, 961-62 (10th Cir. 1989); *Saul*, 928 F.2d at 843.

Although acknowledging this weighty precedent, Arron argues, primarily, (1) that this court should reexamine the trend of cases regarding the preemptive effect of the CSRA, and follow the dissent in *Fausto*, (2) that "as an NHSC payback scholar and debtor, [he] has a higher expectation and right to judicial protections than the 'mine run' probationary employee." Appellant's Br. in First Action at 10, and (3) that he should be entitled to judicial review under the APA because even if the Board ordered him restored to his employment status, it could not compel the NHSC to approve the assignment for service credit and could not compensate him for his damages caused by the loss of his ability to satisfy the judgment through service.

As for Arron's first argument, this court is bound by the *Fausto* majority and our precedent regarding the CSRA's exclusive remedial scheme. As for Arron's second and third arguments, we are not convinced that he should be exempted from the CSRA's exclusive remedial scheme. Although we recognize that Arron's employment with the federal civil service is somewhat unique because he accepted such employment in lieu of paying his judgment debt to the United States, we do not believe that his status affords him any greater procedural or substantive protections than any other federal employee. If Congress wished to give NHSC scholarship recipients or judgment debtors greater protections, it certainly could have done so. We do not believe that a judicially-created exception to the CSRA's exclusive remedies is appropriate.

Furthermore, that the FTCA, APA, and constitutional claims would afford Arron greater opportunities for judicial review and greater compensation for his alleged injuries does not alter our analysis. *See Fausto*, 484 U.S. at 455 (holding CSRA preempts action under Back Pay Act

even though CSRA provided nonpreference excepted service employee no administrative or judicial review of agency's decision): *Bush*, 462 U.S. at 372, 390 (holding CSRA preempts *Bivens* action even though Court assumed that the "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [the employee] for the harm he suffered"); *Brothers v. Custis*, 886 F.2d 1282, 1284 (10th Cir. 1989) (refusing to imply *Bivens* action even though federal employee was limited to petitioning Special Counsel and did not have a money damages remedy); *Hill v. Department of Air Force*, 884 F.2d 1318, 1321 (10th Cir. 1989) ("Even if the Civil Service Reform Act remedy were incomplete, but had not inadvertently omitted damages remedies, no *Bivens* remedy would be implied."). Likewise, Arron's contention that the Board could not compel the NHSC to approve service credit if he is restored to his position does not help him. In the event that the Board restores him to his position and the NHSC refuses to approve such service, Arron may then seek any applicable remedies against the NHSC.[7]

Because Arron's FTCA, APA, and constitutional claims are preempted by the CSRA, the district court properly granted the United States' and Defendants' motions to dismiss in each action, and properly denied Arron's

---

[7] Arron argues that his amended complaint in the second action states a claim against the NHSC for refusing to place him in a new position following his termination and that such a refusal is not a "personnel action" under the CSRA. *See* Appellant's Br. in Sectin Action at 11, 17. Because Arron makes this argument for the first time on appeal, we will not consider it. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir.), *cert. denied*, 116 S.Ct. 57 (1995).

motions for leave to amend. Accordingly, we AFFIRM. The parties' motions for consolidation are GRANTED and all other outstanding motions are DENIED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

## APPENDIX C

[Filed Nov 4 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 96-0052 LH/LFG

BRETT L. ARRON,

Plaintiff,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF HEALTH AND HUMAN SERVICES; PUBLIC HEALTH SERVICE; INDIAN HEALTH SERVICE; NAVAJO INDIAN HEALTH SERVICE; DONNA SHALALA, SECRETARY OF DHHS; TIMOTHY FLEMING; DOUGLAS PETER; GARY ESCUDERO; JOHN HUBBARD; NATIONAL HEALTH SERVICE CORPS; DONALD L. WEAVER, DIRECTOR OF NATIONAL HEALTH SERVICE CORPS; and MYRIAM CURET,

Defendants.

### MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Docket No. 8) and Plaintiff's Contingent Motion for Leave to Amend (Docket No. 9). Having thoroughly considered the memoranda of the parties and being otherwise fully advised in the matter, I find that Defendants' Motion to Dismiss is well taken and will be granted and that

Plaintiff's Motion to Amend is not well taken and will be denied. Plaintiff's entire suit will be dismissed with prejudice. A Final Judgment in conformance with this Memorandum Opinion shall be entered contemporaneously with this opinion.

## FACTUAL BACKGROUND

Plaintiff Brett L. Arron brings this suit against the United States of America, the United States Department of Health and Human Services (HHS) and several HHS officials. Plaintiff seeks relief under the Administrative Procedures Act (APA) and the United States Constitution, Amendments 1, 4, and 5.*

Plaintiff received a National Health Services Corps (NHSC) scholarship during medical school. In return, plaintiff was obligated to pay back the scholarship by providing one year of clinical service in a health care provider shortage area. Dr. Arron defaulted on his service obligation and the United States secured judgment against him. *United States v. Arron*, 954 F.2d 249 (5th Cir. 1992). To satisfy his payback obligation and judgment, Dr. Arron entered into a second agreement with

---

*Plaintiff made similar allegations in another action brought under the Federal Tort Claims Act, which was recently dismissed by Judge Mechem. *Arron v. United States*, CIV No. 95-0885M (D.N.M.), *appeal pending*, No. 96-2086 (10th Cir.). In that suit, he also sought to amend his complaint to add a count under the Administrative Procedures Act. In a Memorandum Opinion and Order dated March 14, 1996, Judge Mechem granted the government's motion to dismiss, holding that the Civil Service Reform Act's comprehensive scheme for addressing prohibited personnel practices preempted Dr. Arron's claims. Judge Mechem declined plaintiff permission to amend his complaint, finding that such an amendment would be futile in light of plaintiff's failure to exhaust his administrative remedies.

NHSC and the United States to provide two years of clinical service in a designated health professional shortage area. Dr. Arron was assigned to work at the Gallup Indian Medical Center (GIMC) as an anaesthesiologist. Dr. Arron began his first year of employment at GIMC in August 1992 on probationary status. He was terminated during his probationary period, in June 1993. Dr. Arron alleges in his complaint that the termination was in retaliation for expressing concerns about the management and medical practices at GIMC in violation of his first amendment rights. Additionally, Dr. Arron claims that he possessed a property interest in fulfilling his payback obligation and judgment through service, a liberty interest in his professional reputation, and a right to privacy in his employment. These interests, Dr. Arron argues, were unlawfully taken from him pursuant to termination procedures which failed to adhere to applicable personnel policies.

The United States has moved to dismiss Dr. Arron's complaint, arguing that his claims are precluded by the comprehensive statutory scheme of the Civil Service Reform Act of 1978 (CSRA). Defendants also argue that Dr. Arron has failed to show any violations of his constitutional rights.

## DISCUSSION

A motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) is granted only when it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Seamons v. Snow,* 84 F.3d 1226, 1231 (10th Cir. 1996). In deciding a motion to dismiss for failure to state a claim, the Court must accept all well-pleaded allegations in the complaint as true and construe them in the light most favorable to

the plaintiff, resolving all reasonable inferences in favor of the plaintiff. *Id.* at 1231-1232. *See also Fuller v. Norton,* 86 F.3d 1016, 1020 (10th Cir. 1996).

**I. Relief under the APA**

Dr. Arron was a member of the civil service through his participation in the NHSC which provides that a scholarship recipient can fulfill his service obligation by becoming a civil servant. 42 U.S.C. §254m. Therefore, the first issue for this Court to address is whether Dr. Arron's status as a civil servant precludes him from bringing an action under the APA to challenge his termination from the GIMC.

The Defendants argue that Dr. Arron's claims are precluded by the existence of a comprehensive remedial scheme available under the Civil Service Reform Act of 1978, Pub.L.No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.). The CSRA created a comprehensive system of procedural protections for civil service employees faced with adverse personnel actions. *LeBlanc v. United States,* 50 F.3d 1025, 1029 (Fed. Cir. 1995). Aggrieved employees may appeal adverse agency actions to the Merit Systems Protection Board (MSPB), 5 U.S.C. §7513(d), and are also entitled to review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. §7703(a)(1), (b)(1). However, only non-probationary employees may directly appeal adverse agency actions to the MSPB. *See generally* 5 U.S.C. §7511(a)(1)(A).

A probationary employee, such as Dr. Arron, is entitled to appeal an agency action to the Office of Special Counsel (OSC), alleging that he has been subject to prohibited personnel practices by his/her agency, and request the OSC to investigate these charges and seek remedial

action. The OSC is authorized to receive and investigate complaints of a prohibited personnel practice. 5 U.S.C. §1214(a)(1)(A). The definition of prohibited personnel practice includes reprisal against a "whistle blower." 5 U.S.C. §2302(b)(8)(A). If the OSC determines that a reasonable basis exists to believe that a prohibited practice has occurred, it may take corrective action. If the OSC does not seek remedial action, the employee may bring an individual right of action before the MSPB on the whistle blower reprisal claim, with the right of judicial review of any adverse decision. 5 U.S.C. §1221-(a), (h)(2).

The Supreme Court has concluded that the CSRA comprehensively overhauled the civil service system, creating an elaborate new framework for evaluating adverse personnel actions against federal employees. *United States v. Fausto,* 484 U.S. 439, 443 (1988), quoting *Lindahl v. OPM,* 470 US 768, 773-74 (1985).

Dr. Arron asks this Court to decline to find that the CSRA precludes his APA claim. He argues that this suit does not concern an employment grievance which arose from his position as a federal employee, but rather, from his status as an NHSC scholar. He claims that the Defendants unlawfully interfered with his right to repay his obligation and judgment through service.

There is a plethora of case law to support my conclusion that the CSRA precludes judicial review of Dr. Arron's complaint. *See LeBlanc v. United States,* 50 F.3d 1025 (Fed. Cir. 1995) (CSRA provides exclusive remedy for reprisal based on whistle blowing activity); *Stephens v. Department of Health and Human Servs.,* 901 F.2d 1571 (11th Cir. 1990)(CSRA is exclusive remedy for reviewing challenges involving prohibited personnel practices); *Harder v. United States,* No. 94-6459, 1995 WL

715501 (10th Cir. Dec. 6, 1995)(unpublished decision) (CSRA preempts denial of separation pay incentives); *Steele v. United States,* 19 F.3d 531 (10th Cir. (CSRA preempts action involving reprisal for whistle blowing activity resulting in wrongful termination); *Petrini v. Howard,* 918 F.2d 1482 (10th Cir. (CSRA preempts Bivens action); *McAuliffe v. Rice,* 966 F.2d 979 (5th Cir. 1992)(CSRA precludes application of the APA); *Kotarski v. Cooper,* 866 F.2d 311 (9th Cir. 1989)(CSRA preempts Bivens action); *Saul v. United States,* 928 F.2d 829 (9th Cir. 1991)(CSRA preempts common law tort actions against federal officials); *Berrios v. Department of the Army,* 884 F.2d 28 (1st Cir. 1989) (CSRA preempts federal constitutional claims and state law defamation claim); *Lehman v. Morrissey,* 779 F.2d 526 (9th Cir. 1985)(CSRA preempts state common law action for intentional infliction of emotional distress).

Dr. Arron's argument is without merit. Dr. Arron ignores Congressional provisions which enable NHSC scholars to fulfill their service obligations by becoming members of the civil service. 42 U.S.C. §254m. Dr. Arron exercised this option. Further, Dr. Arron's complaint alleges a wrongful termination in violation of established policies and procedures as a result of his whistle blowing activity. These alleged violations occurred only as a result of Dr. Arron's employment relationship with the GIMC. Plaintiff's inability to fulfill his payback obligation and judgment through service was an unfortunate incident of his termination from federal employment. However, that incidental result in no way alters either Dr. Arron's status as a federal employee or the personnel actions available such employees.

Dr. Arron asks this court to fashion an exception to the CSRA's preclusive effect, citing *Mescalero Apache*

*Tribe v. Rhoades*, 755 F.Supp. 1484 (D.N.M. 1990)(*Mescalero I*) and *Mescalero Apache Tribe v. Rhoades*, 804 F. Supp. 251 (D.N.M. 1992)(*Mescalero II*). I conclude that the policies underlying these two opinions have no applicability to this matter. In the *Mescalero* cases, an Indian tribe and tribal member brought suit against Indian Health Services (IHS) and HHS. *See Mescalero I*, 755 F. Supp. at 1485. The tribal member, LaPaz, was employed by IHS. *Id.* After being elected to the Mescalero Tribal Council, LaPaz was ordered by the IHS director to either resign from the Tribal Council or to resign from his federal position because of a perceived conflict of interest. *Id.* at 1486.

The *Mescalero I* court acknowledged that, as a federal employee, ordinarily LaPaz's claims would fall within the constructs of the CSRA framework. 755 F.Supp. at 1487. However, since LaPaz was an Indian with a grievance arising from a fundamental Indian statute - the Indian Preference Act - important policies of Indian rights and tribal selfgovernment were involved. *Id.* The Court noted that Congress has shown no indication that it intended to displace substantive and thriving Indian law, declined to hold that the CSRA applied, and thus did not dismiss the case.

The *Mescalero* decisions were guided by the court's concern that, absent district court review, the plaintiff's claims, which involved important Indian statutory law, would not receive adequate consideration. *Mescalero I*, 755 F.Supp. at 1489-90; *Mescalero II*, 804 F.Supp. at 253. The court was concerned whether LaPaz's employment status would prevent the MSPB from reviewing his claims and whether the MSPB had jurisdiction over the Indian law issues involved. *Mescalero I*, 755 F.Supp. at 1489. Because the MSPB's authority to review the plain-

tiff's claims was in doubt, and because the plaintiff's complaint alleged violations of important statutory Indian laws, the court allowed LaPaz to bring suit in federal court despite CSRA preclusion. *Mescalero I*, 755 F.Supp. at 1490.

Dr. Arron argues that an important Indian policy is implicated by his suit because the NHSC program benefits Indian tribes by providing health care professionals to serve Indian communities. I conclude that this fact does not implicate the important statutory Indian laws and policies involved in the *Mescalero* decisions. Furthermore, *Mescalero II* specifically noted that by finding jurisdiction over LaPaz's claims it was "not allowing a circumvention of the CSRA framework, which retains its exclusivity as the remedial mechanism by which an aggrieved federal employee may seek review and redress for a disputed personnel action." 804 F.Supp. at 255-56.

Dr. Arron complains of retaliation against him for whistle blowing—a personnel action prohibited by the CSRA. His claims fall within the scope of the CSRA. Thus, I conclude that Dr. Arron's claim for relief under the APA is preempted by the CSRA and this court is without jurisdiction to review that portion of his complaint.

**II. Relief under the US Constitution**

Dr. Arron next seeks damages for alleged violations of his rights under the First, Fourth and Fifth Amendments. For reasons set forth below, I conclude that Dr. Arron's status as a federal employee precludes him from bringing a *Bivens* action against the defendants.

In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court allowed a plaintiff to seek money damages from

individual federal officers for their alleged violation of the plaintiff's rights arising under the Fourth Amendment to the United States Constitution. The majority opinion cautioned, however, that there would be no cause of action if there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Such special factors were present in *Bush v. Lucas*, 462 U.S. 367 (1983), where the Supreme Court found that the existence of comprehensive civil service remedies prevented Bush from bringing a cause of action directly under the First Amendment. The Court noted that Congress was in the best position to make policy judgments about what remedies should be available for federal employees, and declined to augment the elaborate existing remedial system with a new judicial remedy for the constitutional violation at issue. *Id.* at 390. The Court found that these policy considerations were "special factors counseling hesitation"; therefore, the Court refused to allow a *Bivens* suit. *Id.* at 388-89.

Similarly, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Supreme Court again found congressionally created remedies to be a special factor counseling hesitation and precluding a *Bivens* cause of action. The Court stated that "[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of administration, we have not created additional *Bivens* remedies." *Id.* at 423.

Following *Bush* and *Chilicky*, federal courts consistently have refused to allow *Bivens* suits by federal employees, finding these actions are precluded by the comprehensive remedial scheme of the CSRA. *Petrini*, 918 F.2d 1482; *Hill v. Department of the Air Force*, 884

F.2d 1318 (10th Cir. 1989), *cert. denied,* 110 S.Ct. 2206 (1990)(no *Bivens* suit allowed to supplement CSRA remedies); *Brothers v. Custis,* 886 F.2d 1282 (10th Cir. 1989)(no *Bivens* suit allowed where plaintiff had the right to petition the OSC for redress); *Kotarski,* 866 F.2d 311; *Saul,* 928 F.2d 829.

As stated above, the CSRA allows probationary employees to submit complaints to the OSC regarding prohibited personnel practices which includes reprisals against whistle blowers. This is the essence of Dr. Arron's claim. Therefore, "since the CSRA accommodates plaintiff's constitutional challenge, creation of a *Bivens* remedy for [him] is unwarranted." *Petrini,* 918 F.2d at 1484.

**III. Dr. Arron's Motion to Amend**

As held above, Dr. Arron's constitutional claims are precluded by the CSRA. It is therefore unnecessary for this court to discuss whether the plaintiff has sufficiently alleged violations of the 4th and 5th Amendments. As such, Plaintiff's Motion for leave to amend his complaint to sufficiently plead a violation of his liberty interest is denied. "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or *futility of amendment*". *See Frank v. U.S. West, Inc.,* 3 F.3d 1357, 1365 (10th Cir. 1993)(emphasis added).

For the above-stated reasons Defendants' Motion to Dismiss is shall be granted and Plaintiff's Motion to

Amend his complaint shall be denied. A Final Judgment in conformity with this Memorandum Opinion shall be entered contemporaneously.

/s/ [Illegible]
UNITED STATES DISTRICT JUDGE

---

## APPENDIX D

[Filed Mar 14 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 95-0885-M Civil

BRETT L. ARRON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

## MEMORANDUM OPINION AND ORDER

THIS MATTER comes on for consideration on defendant's motion to dismiss [4-1]. Having considered the motion, response and reply, and being otherwise fully advised in the premises, I find that defendant's motion is well taken and is granted. I also find that plaintiff's motion to amend is not well taken and is hereby denied.

## BACKGROUND

This is an action for damages concerning the employment of plaintiff Brett L. Arron ("Arron"). Plaintiff claims liability against defendant United States of America ("USA") under the **Federal Tort Claims Act ("FTCA"), 28 U.S.C. § §1346 and 2671 *et seq.*** Plaintiff also moves to amend his complaint to add a fourth cause of action under the **Administrative Procedures Act ("APA").**

Between August 1992 and June 1993, Arron was an anesthesiologist at the Gallup Indian Medical Center ("GIMC") in Gallup, New Mexico. The GIMC operates under the Indian Health Service ("IHS"), which in turn, is a component of the Public Health Service and the U.S. Department of Health and Human Service ("HHS"). Arron's employment arose out of an obligation to repay a National Health Service Corps ("NHSC") scholarship that he received while in medical school. Plaintiff had defaulted on his obligation to HNSC and subsequently entered into an agreement with the NHSC and the United States to serve two years as an anesthesiologist in an approved facility. Plaintiff's judgment and NHSC pay-back obligations would be forgiven at the completion of two years of service.

Dr. Arron was on probationary status during his first year of employment at GIMC. He was terminated during this probationary period. Arron claims that his termination constituted a tortious interference with his ability to repay the NHSC judgment by providing health care services at GIMC. In addition, he alleges an environment of negligent management and supervision at GIMC, as well as, retaliatory discharge for his refusal to participate in substandard medical care.

The United States moves for dismissal arguing that Dr. Arron's claims are barred under the **FTCA**, and preempted by the **Civil Service Reform Act of 1978 ("CSRA"), Pub.L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.)**. Defendant also argues that plaintiff should not be permitted to amend his complaint to add a cause of action under the **APA**. Defendant contends that amending the complaint would be futile because plaintiff has not exhausted his administrative remedies.

## DISCUSSION

### I. Motion to Dismiss

A complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). A motion to dismiss will be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Shoultz v. Monfort of Colorado, Inc.*, 754 F.2d 318, 321 (10th Cir. 1985) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). When reviewing a motion to dismiss, I must presume that all the plaintiff's factual allegations are true and construe reasonable inferences in favor of the plaintiff. *Shaw v. Valdez*, 819 F.2d 965, 968 (10th Cir. 1987).

The parties agree that Dr. Arron was a member of the civil service when he elected to serve in the NHSC to fulfill his loan obligation. Thus, his employment is governed by the provisions of the CSRA. The parties also agree that a probationary employee may be terminated with relatively little procedural protection. *See* 5 C.F.R. §315.804. For the reasons set forth below, I find that all of plaintiff's claims are preempted by the Civil Service Reform Act, 5 U.S.C. §§1214, 2302.

The CSRA provides a comprehensive claims procedure for most government employees, including a provision for judicial review of final determinations of the Merit Systems Protection Board, where there is an allegation of prohibited personnel practices. *Steele v. United States*, 19 F.3d 431, 532 (10th Cir. 1994) (citing 5 U.S.C. 1214). The CSRA makes a "personnel action" an element of a prohibited personnel practice. 5 U.S.C. §2302. It defines "personnel action" as including "disciplinary or corrective action." *Id.* §2302(a)(2)(A)(iii).

The CSRA has set up a series of procedural safeguards for covered employees who have suffered adverse employment decisions. They include appeal to the Merit Systems Protection Board, *see* 5 U.S.C. §7513(d), and review by the United States Court of Appeals for the Federal Circuit. *See id.* §§7703(a)(1) & (b)(1).

In reference to this comprehensive scheme, the Supreme Court has stated:

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures – administrative and judicial – by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies.

*Bush v. Lucas*, 462 U.S. 367, 385 (1983).

It is clear that actions "complain[ing] of activities prohibited by the CSRA . . . are preempted by the CSRA." *Petrini v. Howard*, 918 F.2d 1482, 1485 (10th Cir. 1990). Moreover, cases from the Supreme Court, the Tenth Circuit, and a number of sister circuits confirm the preclusive effect of the CSRA. *See United States v. Fausto*, 484 U.S. 439 (1988) (CSRA preempts action under the Federal Back Pay Act); *Bush v. Lucas*, 462 U.S. 367 (1983) (CSRA preempts Bivens action); *LeBlanc v. United States*, 50 F.3d 1025 (Fed. Cir. 1995) (CSRA provides exclusive remedy for reprisal based on whistleblowing activity); *Harder v. United States*, 1995 W.L. 715501 (Unpublished Decision) (10th Cir. 1995) (CSRA preempts denial of separation pay incentives); *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989) (CSRA preempts Bivens Action); *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991) (CSRA preempts common law tort

actions against federal officials); *Berrios v. Department of the Army*, 884 F.2d 28 (1st Cir. 1989) (CSRA preempts federal constitutional claims and state law defamation claim); *Lehman v. Morriseey*, 779 F.2d 526 (9th Cir. 1985) (CSRA preempts state common law action for intentional infliction of emotional distress).

Plaintiff asks this Court to "critically examine and re-examine decisions purportedly holding that the CSRA preempts all actions under the FTCA related to federal employment." Response to Motion to Dismiss at p. 6 ("Pltf.'s Resp."). Plaintiff argues primarily that the preemption decisions "have gone too far and are not justified. . ." and that the dissent in *Fausto* is "worthy of being followed." *Id.* at p. 13. However, I decline to accept plaintiff's invitation to reject established precedent. "The CSRA has established a comprehensive system for reviewing personnel action taken against federal employees." *Fausto*, 484 U.S. at 455. Consistent with these principles, I find that Dr. Arron's claims are preempted by the CSRA's comprehensive scheme for addressing prohibited personnel practices.

II. Motion to Amend

Plaintiff seeks leave to amend his complaint to add a fourth cause of action under the Administrative Procedures Act ("APA"). Fed.R.Civ.P. 15(a) provides that "leave shall be freely given when justice so requires." Additionally, "[r]efusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

Defendant argues that plaintiff's proposed fourth count will be subject to dismissal because plaintiff has failed to exhaust his administrative remedies under the APA. In addition, defendants contends that this Court does not have jurisdiction over plaintiff's appeal. On June 14, 1993, Dr. Arron filed a complaint based on whistleblowing activities with the Office of Special Counsel ("OSC"). The OSC sent plaintiff a letter on November 18, 1994 declining to prosecure the whistleblowing action. Plaintiff concedes that he has appealed the denial by OSC to the Merit Systems Protection Board ("MSPB") and that the appeal is "now pending." **Amended Complaint, Proposed Fourth Claim at ¶ 3E.**

In the first instance, **5 U.S.C. §704** provides that a plaintiff cannot request review of an agency decision until there has been a final decision. It is well established that a plaintiff must exhaust his administrative remedies before he can obtain judicial review of the agency's decision. ***Workers of America v. Arizona Agr. Employment Relations Bd.***, **669 F.2d 1249 (9th Cir. 1982).** However, the exhaustion requirement is not applicable where "the remedies are inadequate, inefficacious, or futile, where pursuit of them would irreparably injure the plaintiff, or where the administrative proceedings themselves are void." ***Aleknagik Natives Ltd. v. Andrus,*** **648 F.2d 496, 499-500 (9th Cir. 1980).**

In this case, I do not find any reason why plaintiff should be exempted from the exhaustion requirement. Dr. Arron gives no concrete reason why he should be allowed to abandon the administrative process. He states only that the MSPB "process grines on in an exquisitely slow manner." **Plaintiff's Reply to Defendant's Response to Motion for Leave to Amend at p. 2.** Plaintiff's comments do not justify abandonment of the administrative

process. I find that allowing Dr. Arron to amend his complaint will be futile as it will undoubtedly be subject to dismissal.

In any event, this Court does not have jurisdiction to review decisions of the MSPB. In his proposed fourth count, plaintiff is pursuing remedies under the Whistleblower Protection Act ("WPA"). **Amended Complaint, Proposed Fourth Claim at ¶ 3.** The procedure under the WPA is simple. A plaintiff must first exhaust the complaint process before the OSC. **5 U.S.C. §1214.** If the OSC declines to prosecute the complaint, an employee covered under the WPA may file an "individual right of action" ("IRA"). **5 U.S.C. §1221.** An IRA entitles the employee to a trial-type hearing before an administrative judge of the MSPB. Finally, the employee has a right of judicial review to the U.S. Court of Appeals for the Federal Circuit. **5 U.S.C. §§1214(h), 7703(b).** At no time does the WPA provide for judicial review in District Court. Now, Therefore,

**IT IS ORDERED** that defendant's motion to dismiss is hereby granted and is dismissed with prejudice;

**IT IS FURTHER ORDERED** that plaintiff's motion to amend his complaint is hereby denied.

/s/ [Illegible]
SENIOR UNITED STATES DISTRICT JUDGE

---

[Filed Mar 14 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 95-0885-M Civil

BRETT L. ARRON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

## JUDGMENT

Having granted defendant's motion to dismiss by a Memorandum Opinion and Order entered contemporaneously with this Judgment,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the motion to dismiss is entered in favor of defendant United States of America on all of plaintiff's claims, which are hereby dismissed with prejudice.

**IT IS SO ORDERED.**

/s/ [Illegible]
SENIOR UNITED STATES DISTRICT JUDGE

## APPENDIX E

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONSTITUTION:

Article III

Section 2, Clause 1.
"Section 2. The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

U.S. CONSTITUTION:

Article III

Section 2, Clause 2.
". . . in all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations as the Congress shall make."

U.S. CONSTITUTION:

Amendment I
"Congress shall make no law . . . abridging the freedom of speech. . . ."

U.S. CONSTITUTION:

Amendment V
"No person shall . . . be deprived of, life, liberty, or property, without due process of law. . . ."

5 USC §701:
"(a) This chapter applies, according to the provisions thereof, except to the extent that–

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law. . . ."

5 USC §702:

"A person suffering legal wrongs because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . . *Provided,* that any mandatory or injunction decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on Judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or implied forbids the relief which is sought."

5 USC §704:

"Agency action made reviewable by statute and final agency action for which there is not other adequate remedy in a court are subject to judicial review. . . ."

5 USC §1221(a):

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, . . . may, with respect to any personnel action taken, or proposed to be taken, . . . as a result of a prohibited personnel practice described in section 2302(b)-(8), seek corrective action from the Merit Systems Protection Board.

5 USC §2105:

"for the purpose of this title, "employee", . . . means an officer and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

. . . . . .

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) Subject to the supervision of an individual named by paragraph (1). . . ."

5USC §2301(b):
"Federal personnel management should be implemented consistent with the following merit system principles:

. . .

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

. . .

(4) All employees should maintain high standards of integrity, conduct, and concern for public interest.

. . .

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

. . .

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

(A) a violation of any law, rule, or regulation, or

(B) gross mismanagement, . . . , an abuse of authority, or a substantial and specific danger or the public health or safety."

5 USC §2302(a)(2):
"[A personnel action is]
(i) an appointment;
(ii) a promotion;
(iii) an action under chapter 75 of this title or other disciplinary or corrective action;
(iv) a detail, transfer, or reassignment;
(v) a reinstatement;
(vi) a restoration;
(vii) a reemployment;
(viii) a performance evaluation under chapter 43 of this title;
(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and
(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level; with respect to an employee in or applicant for, a covered position in an agency."

5 USC §2302(b):
"Any employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

. . .

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consist of–

(A) an evaluation of the work performance ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual,

. . .

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as reprisal for–

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences–

(I) A violation of any law, rule, or regulation or

(II) gross mismanagement . . . abuse of authority, or a substantial and specific danger to public health or safety.

. . .

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others . . .

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title."

25 USC §1601(a-f):
"The Congress finds that–
(a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.

(b) A major national goal of the United States it to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.

(c) Federal health services to Indians have resulted in a reduction in the prevalence and incidences of preventable illnesses among, and unnecessary and premature deaths of, Indians.

(d) Despite such services, the unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States. . . .

(e) All other Federal services and programs in fulfillment of the Federal responsibility to Indians are jeopardized by the low health status of the American Indian people.

(f) Further improvement in Indian health imperiled by–

(1) inadequate, outdated, inefficient, and undermanned facilities. . . .

(2) shortage of personnel. . . .

(3) insufficient services. . . .

(g) The Indian people's growth of confidence in Federal Indian health services is revealed by their increasingly heavy use of such services. Progress toward the goal of better Indian health is dependent on this continued growth of confidence. Both such progress and such confidence are dependent on improved federal Indian health services."

25 USC §1602:
"The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy."

25 USC §1254:
"Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree. . . ."

28 USC §1361:
"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 USC §2201(a):
(a) "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such

declaration whether or not further relief is or could be sought. . . ."

28 USC §2202:
"Further necessary or proper relief based on a declaratory judgment or decree may be granted. . . ."

28 USC §2674:
"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, . . . ."

28 USC §2680:
"The provisions of this chapter and section 1346(b) of this title shall not apply to–
(a) Any claim based upon an act or omission of an employee of the Government, . . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved abused.

. . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: . . .

42 USC §254d(a).:
"There is established, within the Service, the National Health Service Corps (hereinafter in the subpart referred to as the "Corps") which (1) shall consist of–

. . .

(c) "Such other individuals who are not employees of the United States. . . ."

42 USC §254e(a):
"(1) For purposes of this subpart the term "health manpower shortage area" means (A) in an area . . . which the Secretary determines has a health manpower shortage and which is not reasonably accessible to an adequately served area, (B) a population group which the Secretary determines has such a shortage, or (c) a public or nonprofit private medical facility or other public facility which the Secretary determines has such a shortage.

(2) For purposes of this subsection, the term "medical facility" means a facility for the delivery of health services and includes–

. . .

(D) a Federal medical facility."

42 USC §2541(a):
"The Secretary shall establish the National Health Service Corps Scholarship Program . . . to assure an adequate supply of trained physicians, dentists, and nurses for the National Health Services Corps. . . ."

42 USC §254m(a).:
"Except as provided in section 254n of this title, each individual who has entered into a written contract with the Secretary under section 2541 of this title shall provide service in the full-time clinical practice of such individual's profession as a member of the Corps for the period of obligated service provided in such contract."

42 USC §254m(d):
"The Secretary shall assign individuals performing obligated service in accordance with a written contract under the Scholarship Program to health manpower shortage areas in accordance with sections 254d through 254h and sections 254j and 254k of this title."

42 USC §254n(a):

"The Secretary shall, . . . release an individual from all or part of his service obligation under section 254m(a) of this title . . . if the individual applies for such a release under this section and enters into a written agreement with the Secretary under which the individual agrees to engage for a period equal to the remaining period of his service obligation in the full time private clinical practice (including service as a salaried employee in an entity directly providing health services) of his health profession—"

. . .

(1) ". . . in the health manpower shortage area in which such individual is serving on such a date; or"

. . .

(2) "in the case of any other individual, in a health manpower shortage area. . . ."

42 USC §2540(b)(1):

"Except as provided in paragraph (2), if an individual breaches his written contract by failing (for any reason not specified in subsection (a) of this section or section 254p(d) of this title) either to begin such individual's service obligation in accordance with section 254m or 254n of this title or to complete such service obligation, the United States shall be entitled to recover from the individual an amount determined in accordance with the formula

$$A = 3\,0 \qquad \frac{t - s}{t}$$

in which "A" is the amount the United States is entitled to recover, "0" is the sum of the amounts paid under this subpart to or on behalf of the individual and the interest on such amounts which would be payable if at the time

the amounts were paid they were loans bearing interest at the maximum legal prevailing rate, as determined by the Treasurer of the United States; "t" is the total number of months of such period served by him in accordance with section 254m of this title or a written agreement under section 254n of this title. Any amount of damages which the United States is entitled to recover under this subsection shall, within the one year period beginning on the date of the breach of the written contract (or such longer period beginning on such date as specified by the Secretary for good cause shown), be paid to the United States.

42 USC §254o(c)(2):
"The Secretary shall by regulation provide for the partial or total waiver or suspension of any obligation of service or payment by an individual under the Scholarship Program (or a contract thereunder) whenever compliance by the individual is impossible or would involve extreme hardship to the individual and if enforcement of such obligation with respect to any individual would be unconscionable."

5 CFR §315.804(a):
"When an agency decides to terminate an employee serving a probationary . . . period, it shall [notify him] why . . . as to the inadequacies of his performance or conduct."

5 CFR §315.806:
"A . . . an employee may appeal to the Merit Systems Protection Board in writing a decision to terminate him under §315.804 . . . only

. . .

[reasons not applicable]"

42 CFR §62.1:

"The purpose of this program is to assure an adequate supply of trained health professionals for the National Health Service Corps which is used by the Secretary to improve the delivery of health services in health manpower shortage areas."

---

SUPREME COURT RULES:

Rule 13.

"1 . . . [A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."

. . .

"3 . . . But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing . . . ."

---